Supreme Court, U.S.
FILED
JAN 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1017

In the Supreme Court of the United States

OCTOBER TERM, 1986

SANTOS DEJESUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the evidence was insufficient to support the admission into evidence of the declarations of his co-conspirators under Fed. R. Evid. 801(d)(2)(E).

1. Following a bench trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to distribute heroin and three substantive narcotics counts. He was sentenced to three years' imprisonment on the conspiracy count and a five-year term of probation on the remaining counts. The court of appeals affirmed (Pet. App. A1-A11).

Petitioner was tried on stipulated facts. The evidence showed that he was a member of a large heroin and cocaine distribution ring. Much of the evidence consisted of taped telephone conversations between two other members of the ring, Louis Rupert Garcia (Papo), and Louis Soto Garcia (Garcia).

On July 30, 1984, Garcia, who was in Puerto Rico, telephoned Papo in New York and instructed him to deliver 250 grams of heroin to petitioner, whom Garcia had left in charge of the heroin business while Garcia was away. Garcia also instructed Papo to tell petitioner that a man named "Nelson" would pick up the heroin from petitioner the following day for delivery to Garcia. Garcia and Papo then discussed the quality of the heroin that was to be delivered that afternoon and the delivery of an even higher quality heroin that was to take place later. Pet. App. A3.

About an hour and a half later, Papo telephoned petitioner at a number listed in the name of Garcia's wife. When petitioner said he had spoken with Garcia, Papo told petitioner to expect a delivery of something in about an hour and that Garcia would be waiting for petitioner to deliver it to him. Petitioner replied that he would be ready. Pet. App. A3.

Four days later, Garcia telephoned Papo from Puerto Rico and informed him that he had received the heroin and that their plan had "worked perfectly." Garcia and Papo then arranged another heroin delivery in which petitioner would be the middleman. Garcia gave Papo petitioner's home telephone number and instructed Papo to see petitioner the following day to arrange for the heroin delivery. The next day, Papo telephoned Garcia in Puerto Rico and told him that he had delivered a half kilogram of heroin to petitioner. Pet. App. A3.

On September 6, 1984, DEA agents arrested petitioner. During their search of petitioner's residence the agents found various amounts of cocaine, heroin, and narcotics paraphernalia. That same day, agents searched Papo's residence and found substantial evidence of a narcotics conspiracy, including records corresponding to the sales of heroin to Garcia that were negotiated by phone. Pet. App. A4.

The court of appeals held that petitioner's admission that he had been a middleman for Papo and Garcia, together with the nonhearsay portions of the conversations between Papo and Garcia, constituted sufficient independent evidence to support the admission into evidence of the declarations made by Papo and Garcia in furtherance of the conspiracy.

2. The court of appeals was correct in concluding that there was sufficient independent evidence to support the admission of the co-conspirators' statements under Fed. R. Evid 801(d)(2)(E). That fact-bound question merits no further review.

Rule 801(d)(2)(E) provides that a co-conspirator's statement made during the course of, and in furtherance of, a conspiracy is not hearsay and is therefore admissible into evidence. Before the co-conspirators' declarations are admitted into evidence, the prosecution must establish that the declarants were members of a conspiracy and that the defendant was a member of that conspiracy. Even in circuits that require independent evidence of the existence of the conspiracy, a defendant's admission qualifies as such independent evidence. See, *e.g.*, *United States* v. *Perez*, 658 F.2d 654, 658-659 (9th Cir. 1981); *United States* v. *Franklin*, 586 F.2d 560, 568-569 (5th Cir. 1978), cert. denied, 440 U.S. 972 (1979). Furthermore, co-conspirators' statements that are considered for purposes other than their truth also qualify as independent evidence of a conspiracy. See *United States* v. *Cambindo Valencia*, 609 F.2d 603, 635 n.24 (2d Cir. 1979), cert. denied, 446 U.S. 940 (1980). Cf. *United States* v. *Inadi*, No. 84-1580 (Mar. 10, 1986), slip op. 10-11 & n.11 (co-conspirators' statements that are offered for a purpose other than to establish the truth of the matter asserted are properly admitted into evidence without raising Confrontation Clause concerns).

Here, there was clearly sufficient independent evidence of a drug trafficking conspiracy between petitioner, Papo, and Garcia to justify admission of Papo's and Garcia's statements under Fed. R. Evid. 801(d)(2)(E). First, petitioner's admissions that he was a middleman between Papo and Garcia proved his participation in the transaction.* Second, large portions of the conversations between Papo and Garcia were either verbal acts showing that the participants were negotiating drug transactions, see *United States* v. *Alvarez-Porras*, 643 F.2d 54, 57-58 (2d Cir.), cert. denied, 454 U.S. 839 (1981); *United States* v. *Wolfson*, 634 F.2d 1217, 1219 (9th Cir. 1980), or statements reflecting their intentions to engage in drug transactions. See Fed. R. Evid. 803(3) (evidence of state of mind is an exception to the hearsay rule); *United States* v. *Cicale*, 691 F.2d 95, 103 (2d Cir. 1982), cert. denied, 460 U.S. 1082 (1983). On those grounds alone, there was ample evidence of the existence of the conspiracy and petitioner's participation in it.

Because the evidence independent of the hearsay declarations themselves was sufficient to support the district court's finding of a conspiracy, there is no reason to hold this case pending the disposition of *Bourjaily* v. *United States*, cert. granted, No. 85-6725 (Oct. 14, 1986). One of the issues in that case is whether the trial court must look only to independent evidence in determining whether a conspiracy existed and whether the declarant and the defendant were members of the conspiracy. Because the district court and the court of appeals in this case did not rely on the hearsay portions of the declarations, but only on independent non-hearsay evidence, the outcome of this case would

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*Papo's statements to petitioner during their conversation were admissible as adoptive admissions under Fed. R. Evid. 801(d)(2)(A) and to provide the context of petitioner's own statements. See *United States* v. *Alvarez-Porras*, 643 F.2d 54, 57-58 (2d Cir.), cert. denied, 454 U.S. 839 (1981).

not be affected by *Bourjaily*, regardless of how that case is decided.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1987